No. 82-5834

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALTER JUNIOR BLAIR,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

JOHN ASHCROFT
Attorney General

JOHN M. MORRIS III
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

INDEX

Question Presented ii

Table of Authorities

Cases Cited iii

Constitutional Provisions and Statutes Cited.... iv

Statement of the Case 1

Argument 2

Conclusion 10

QUESTIONS PRESENTED

1. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution because of the trial court's refusal to give an instruction upon the lesser crime of first degree murder, where this crime was not a submissible "lesser included offense" under Missouri law and where the jury was instructed upon the lesser included offenses of second degree murder and manslaughter.

2. Whether petitioner may raise constitutional claims in this Court which were never properly presented to the Supreme Court of Missouri or any other state court.

TABLE OF AUTHORITIES

Cases Cited

Beck v. Alabama, 447 U.S. 625 (1980).....2, 4

Bouie v. City of Columbia, 378 U.S. 347 (1964).....5, 7

Godfrey v. Georgia, 446 U.S. 420 (1980).....9, 10

Gregg v. Georgia, 428 U.S. 153 (1976); 8, 9

Hopper v. Evans, ___ U.S. ___, 102 S.Ct. 2049,
72 L.Ed.2d 367 (1982).....4

Linkletter v. Walker, 381 U.S. 618 (1965).....7

Lockett v. Ohio, 438 U.S. 586 (1978).....8

Marks v. United States, 430 U.S. 188 (1977).....5

People v. Smith, 78 Ill.2d 298, 399 N.E.2d 1289,
(1980).....3

Sandstrom v. Montana, 442 U.S. 510 (1979).....6, 8

State v. Baker, 636 S.W.2d 902 (Mo. banc 1982).....3, 4, 6, 7

State v. Blair, 638 S.W.2d 739 (Mo. banc 1982).....1, 8, 9

State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982).....5, 6

State v. Bradshaw, 593 S.W.2d 562 (Mo.App., W.D. 1979)....6

State v. Carter, 205 Neb. 407, 288 N.W.2d 35 (1980).....3

State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).....3

State v. Echevarrieta, 621 P.2d 709 (Utah 1980).....3

State v. Franco, 544 S.W.2d 533 (Mo. banc 1976),
cert. denied 431 U.S. 957 (1977).....2

State v. Gardner, 618 S.W.2d 40 (Mo. 1981).....6

State v. Handley, 585 S.W.2d 458 (Mo. 1979).....6

State v. Jasper, 486 S.W.2d 268 (Mo. banc 1972).....2

State v. Mannon, No. 63674 (Mo. banc, August 31, 1982)....2

State v. Oliver, 520 S.W.2d 99 (Mo.App., Spr.D. 1975).....5

State v. Sangster, 299 N.W.2d 661 (Iowa 1980).....3

State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982), cert.
denied ___ U.S. ___, 103 S.Ct. 239 (1982).....8

State v. Smith, 592 S.W.2d 165 (Mo. banc 1979).....3

Street v. New York, 394 U.S. 576 (1969).....6

United States v. Bear Ribs, 562 F.2d 563 (8th Cir. 1977),
cert. denied, 434 U.S. 974 (1977).....3

Webb v. Webb, 451 U.S. 492 (1981).....6, 8, 9

Woodson v. North Carolina, 428 U.S. 280 (1976).....8

Constitutional Provisions and Statutes Cited

Eighth Amendment, U.S. Constitution ii

Fourteenth Amendment, U.S. Constitution..... ii

§ 565.001, RSMo 1978 ..... 1, 2

§ 565.003, RSMo 1978 2

§ 565.004, RSMo 1978 2

§ 565.005, RSMo 1978 2

§ 565.012, RSMo 1978 ..... 1, 8, 9

§ 556.046.1, RSMo 1978 3

Missouri Supreme Court Rule 84.17 5

STATEMENT OF THE CASE

Petitioner Walter Junior Blair was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the contract murder of Kathy Jo Allen, committed to prevent her from testifying against the person procuring the murder, who had previously raped her. The facts of this crime are extensively set out in the opinion of the Supreme Court of Missouri, State v. Blair, 638 S.W.2d 739, 743-746 (Mo. banc 1982), and will not be restated here.

The facts material to the consideration of petitioner's claims are as follows: at the submission of the present case to the jury in the guilt phase of trial, the jury was given verdict directing instructions on capital murder (the offense charged), conventional second degree murder and manslaughter. No instruction was given on the offense of first degree murder (felony-murder); under the decisional authority at the time of petitioner's trial, first degree murder was not a lesser included offense of capital murder. Following petitioner's conviction of capital murder, additional evidence was adduced by the state regarding petitioner's prior convictions. The jury imposed a sentence of death upon petitioner, finding as aggravating circumstances that (1) the victim was murdered for the purpose of receiving money or anything of material value, § 565.012.2(4), RSMo 1978; (2) the petitioner committed the murder as an agent of another, § 565.012.2(6); (3) the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind," § 565.012.2(7); and (4) the murder was committed for the purpose of interfering with the lawful custody of the procurer of the murder, § 565.012.2(10).

Of the four essential claims advanced by petitioner in his present petition, one (see part 1, infra) was properly raised in the state trial and appellate courts. Two others (parts 2 and 3, infra) were asserted for the first time in

petitioner's motion for rehearing after the issuance by the Missouri Supreme Court of its opinion affirming petitioner's conviction; under Missouri law, claims raised for the first time in a motion for rehearing are not reviewable by the appellate court. Petitioner's fourth contention (part 4, infra) has never been raised in any state court. Accordingly, only the first of these claims is properly reviewable in the petition at bar.

ARGUMENT

1. Submission of Lesser Offenses

Petitioner first contends that he was entitled, as a matter of federal constitutional law, to an instruction on the lesser offense of first degree murder. His only citation for this novel proposition is Beck v. Alabama, 447 U.S. 625 (1980). At petitioner's trial, the jury was instructed upon capital murder (the offense charged), conventional second degree murder and manslaughter.

Under the statutory and decisional law of Missouri, homicide is graduated into four classifications:

(1) capital murder, § 565.001, RSMo 1978: murder with deliBeration and premeditation;

(2) first degree murder, § 565.003, RSMo 1978: murder in the course of certain enumerated felonies;

(3) second degree murder, § 565.004, RSMo 1978: murder with premeditation (conventional second degree murder), or murder in the course of any non-enumerated felony (second degree felony-murder);[1] and

(4) manslaughter, § 565.005, RSMo 1978: any unlawful killing.

---

[1]For the decisional definition of second degree murder, see State v. Mannon, No. 63674 (Mo. banc August 31, 1982); State v. Franco, 544 S.W.2d 533, 535 (Mo. banc 1976), cert. denied 431 U.S. 957 (1977); State v. Jasper, 486 S.W.2d 268, 271 (Mo. banc 1972).

With regard to the submission to the jury of offenses other than that charged, the law of Missouri is well established: no such additional offense may be submitted unless (1) it is a "lesser included offense" of the crime charged; or (2) it is specifically designated by statute as a "lesser degree" of the charged offense. State v. Baker, 636 S.W.2d 902, 904 (Mo. banc 1982); § 556.046.1, RSMo 1978. To be a "lesser included offense," the statutory elements of the crime must be included within the offense charged--for example, conventional second degree murder (murder with premeditation) is a lesser included offense of capital murder (murder with deliberation and premeditation). See State v. Baker, supra, at 904; State v. Smith, 592 S.W.2d 165, 166 (Mo. banc 1979). This "statutory elements" test for lesser included offenses is the prevailing standard in numerous other jurisdictions.[2] Under these principles, it would have been erroneous and improper to instruct the jury on first degree murder in a capital murder prosecution:

> "First degree murder in Missouri requires proof of commission of a felony; capital murder does not. Therefore, first degree murder is not a lesser included offense of capital murder on their elements. Nor can first degree murder be described as 'specifically denominated by statute as a lesser degree' of capital murder" (citation omitted). State v. Baker, supra, at 904.

Petitioner makes no attempt to dispute the above legal principles. Rather, he essentially argues (although he carefully avoids framing it in these terms) that the statutory elements test must be declared unconstitutional and instructions

---

[2] See, e.g., State v. Davis, 302 N. C. 370, 275 S.E.2d 491, 493 (1981); People v. Smith, 78 I112d 298, 399 N.E.2d 1289, 1292 (1980); State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980); State v. Carter, 205 Neb. 407, 288 N.W.2d 35, 37 (1980); State v. Echevarrieta, 621 P.2d 709, 712 (Utah 1980); United States v. Bear Ribs, 562 F.2d 563, 564 (8th Cir. 1977), cert. denied, 434 U.S. 974 (1977).

given on any lesser offense which may be supported by the evidence--in this case, first degree murder. Petitioner cites no pertinent authority, and respondent is aware of none, which supports his theory. Beck v. Alabama, supra, cited by petitioner, is of no benefit to his claim. As noted by the Missouri Supreme Court,

> "Beck requires that the trier of fact in a capital murder case be allowed to consider lesser included offenses supported by the evidence. Cf. Hopper v. Evans, ___ U.S. ___, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). The Beck requirement prevents the jury from being in an 'all or nothing' situation in which it might err on the side of conviction. Although Beck is not precisely on point, due to the fact that first degree murder is not a lesser included offense of capital murder in Missouri, examination of the elements of the homicides, notably the mental states, illustrates that it is second degree murder, not first degree murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder" (citations omitted). State v. Baker, supra, at 905.

The fallacy in petitioner's argument is illustrated by his statement that "[t]he State's evidence supported two theories of guilt, intentional murder and felony murder, but the trial court submitted only one theory--intentional murder" (petition at 8). Unquestionably, the state could have elected to prosecute this case on alternative theories of deliberated murder and murder in the course of an enumerated felony. However, the state did not elect to do so, and instead assumed the higher burden of proving that appellant intended to kill Kathy Jo Allen. It is absurd for petitioner to assert that he was constitutionally entitled to be prosecuted on all possible theories, or that his "due process" rights were violated because he was not.

2 "Ex Post Facto Law"

It is next claimed that the holding by the Missouri Supreme Court in State v. Baker, supra, that first degree murder was not a lesser included offense of capital murder, which decision issued after petitoner's conviction, constituted an ex post facto law under Article I, § 10 of the United States Constitution. Although the ex post facto clause applies only to enactments by legislatures, a similar limitation upon statutory construction by the judiciary has been implied as a matter of "due process." Marks v. United States, 430 U.S. 188, 191-192 (1977); Bouie v. City of Columbia, 378 U.S. 347, 352-355 (1964).

The principal difficulty with this "ex post facto" due process theory is that it has never been presented in any reviewable fashion to any state trial or appellate court. As petitioner himself confesses (petition at 5), his first effort to raise the present claim came in the motion for rehearing filed in the Missouri Supreme Court after the issuance by that court of the opinion in this case. Under long-established Missouri law, legal claims and theories are not properly reviewable when raised for the first time in motions for rehearing after the issuance of the opinion by the appellate court. State v. Bolder, 635 S.W.2d 673, 693 (Mo. banc 1982); State v. Oliver, 520 S.W.2d 99, 101-102 (Mo.App., Spr.D. 1975). As stated in Missouri Supreme Court Rule 84.17, "[t]he sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion." In light of these authorities, the present contention is not properly reviewable in the present petition. As this Court has noted,

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgement of a state court can arise only if the record as a whole shows either expressly or by clear implication

that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979). Since there is not the slightest indication from the Missouri Supreme Court's opinion that it reviewed petitioner's improperly-raised claims, cf. State v. Bolder, supra, at 693, it cannot be said that they were "adequately presented in the state system." See Street v. New York, 394 U.S. 576, 582 (1969).

In any event, petitioner's argument is factually meritless. His petition blatantly ignores the fact that the state decisional law in effect at the time of his trial clearly indicated that first degree murder was not a lesser included offense of capital murder. In State v. Handley, 585 S.W.2d 458 (Mo. 1979) (plurality opinion); and State v. Bradshaw, 593 S.W.2d 562 (Mo.App., W.D. 1979), it was held that conventional second degree murder was not a lesser included offense of first degree murder because the former required mental elements of intent while the latter required only the commission of a felony. State v. Handley, supra, at 462; State v. Bradshaw supra, at 565-566. A necessary implication from this conclusion, for precisely the same reason, is that first degree murder is not a lesser included offense of capital murder. See State v. Baker, supra, at 905. Petitioner's theory that decisions relating to the submission of lesser included offenses may only apply prospectively defeats his own argument: the first decision overruling Handley and Bradshaw and concluding that conventional and felony murder theories are not interchangeable came more than half a year after petitioner's trial. State v. Gardner, 618 S.W.2d 40 (Mo. 1981).

Even ignoring these facts, petitioner's argument states no colorable constitutional claim. Petitioner advances no authortiy, and respondent finds none, which has ever recognized a substantive constitutional right of "notice" regarding potential lesser included offense. To the contrary, it is manifest that the submission of lesser offenses is purely a

matter of procedure and has long been subject to change by decision, statute or court rule. The present issue is clearly distinguishable from that in Bouie v. City of Columbia, supra, cited by petitioner. In Bouie, the defendant was punished by a retroactive and unforeseeable expansion of a criminal statute, and thus was subjected to conviction without fair warning of the proscribed conduct. Id., 378 U.S. at 352-355. Nothing of the kind is present here: petitioner does not claim to be unaware that deliberated murder was criminal--he simply asserts that he should have received an additional "lesser offense" instruction. It has never been held, and it should not be held, that such a complaint rises to the level of constitutional "due process."

In addition to advancing his "due process" claim, petitioner asserts that his right to equal protection was violated because cases decided prior to State v. Baker, supra, which changed the law on the present issue, were treated differently from cases cited thereafter. No argument by respondent is required to reduce this claim to absurdity: according to petitioner's rationale, any change in the law which is not applied retroactively to all cases would violate equal protection. Such is obviously not the case. See Linkletter v. Walker, 381 U.S. 618, 622-635 (1965).

3. Evidence of Other Crimes.

Petitioner's third contention seems to be that the United States Constitution prohibits the trial jury from considering, at the punishment stage of trial, any evidence other than that specifically relating to the aggravating or mitigating circumstances submitted. Specifically, he asserts that the introduction of his prior convictions at the punishment stage was improper because these convictions were not an

element of the aggravating circumstances found by the jury.[4]

As with petitioner's previous contention (see part 2, supra), this claim is raised for the first time in this certiorari petition, having never been legitimately advanced in any state trial or appellate court. That being the case, it is not properly reviewable in this petition. Webb v. Webb, supra, at 496-497; Sandstrom v. Montana, supra, at 527.

In any case, petitioner's theory is directly contrary to the principle of individualized sentencing, repeatedly stated and emphasized by this Court. In Woodson v. North Carolina, 428 U.S. 280 (1976), for example, it is stated that

> "the fundamental respect for humanity underlying the Eight Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death" (citation omitted). Id. at 304.

See also Gregg v. Georgia, 428 U.S. 153, 189 (1976); Lockett v. Ohio, 438 U.S. 586, 602-605 (1978). In light of this well-established policy, it is frivolous for petitioner to assert that the jury is limited to consideration of the aggravating circumstances submitted in the particular case. The sole function of aggravating circumstances is to limit and channel the discretion of the jury at the threshold of the capital sentencing determination. Gregg v. Georgia, supra, at 197-198; see State v. Shaw, 636 S.W.2d 667, 675 (Mo. banc 1982), cert. denied ___ U.S. ___, 103 S.Ct. 239 (1982). Once an aggravating circumstance is found, the jury's duty is to exercise its discretion in determining

---

[4]Petitioner also makes an obscure reference in his petition to evidence "that he had been arrested for an unrelated murder" (petition at ii, 15). The only evidence relating to this subject came during the guilt stage of trial and was admitted for the sole purpose of showing petitioner's motive and intent in committing the murder. See State v. Blair, 638 S.W.2d 739, 757 (Mo. banc 1982). Petitioner did not claim in any state proceeding that the introduction of evidence of other crimes is per se unconstitutional, and does not appear to do so in this petition.

whether the death penalty is appropriate.. Gregg v. Georgia, supra, at 197-198. In making this determination, it is not only proper but necessary that the jury have all possible facts before it which are relevant to the crime and the defendant, including the defendant's prior convictions, if any. Id. No possible merit is present in this point.

4. Validity of Aggravating Circumstance

Finally, petitioner contends that one of the four aggravating circumstances found by the jury in this case, that "[t]he capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another," § 565.012.2(10), RSMo 1978, was unconstitutionally vague as applied under the holding of this Court in Godfrey v. Georgia, 446 U.S. 420 (1980). The evidence in this case was that petitioner was hired by one Larry Jackson to murder the victim, Kathy Jo Allen, because she had previously been raped by Jackson and Jackson desired to prevent her from testifying against him. State v. Blair, supra, at 743-746.

As with his two previous claims of constitutional violations, petitioner did not bother to advance his current theory in the state courts; his only effort to attack the present aggravating circumstance was to claim that the evidence was insufficient to sustain it. See State v. Blair, supra at 758-759. Therefore, his present claim that § 565.012.2(10) is unconstitutional as applied is not subject to review in this petition. Webb v. Webb, supra, at 496-497.

Even were this issue to be reviewed, it presents no colorable constitutional issue. Petitioner's theory is that this aggravating circumstance is vague as applied because his attempt was not to interfere with Jackson's present custody (his incarceration on a charge of rape) but with his possible future custody (his imprisonment on a conviction of rape), and that this attempt might not have succeeded (petition at 16). In so arguing, he attempts to read into the language of the aggravating circumstance requirements which are

or custody involved

be a present arrest or custody, and that the attempt to prevent it must be successful. To the contrary, the language of § 565.012.2(10) could not be clearer or more unequivocal: the issue is whether the capital murder was committed for the purpose of interfering with an arrest or lawful custody. This requisite was clearly satisfied by the evidence in the present case. Cf Godfrey v. Georgia, supra.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

JOHN M. MORRIS III
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

JAN 21 PAGE 9

ORIGINAL

No. 82-5834

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALTER JUNIOR BLAIR,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSOURI

SUPPLEMENTAL RESPONSE TO THE STATES RESPONSE

WALTER JUNIOR BLAIR,
PRO SE

Box 900
Jefferson City Missouri,
65102

SUPPLEMENTAL RESPONSE TO THE STATES
RESPONSE

Comes now the petitioner and would inform this court that the states contention that the due process arguement was not properly presented to the States Court (States Respondent, p. 5), is clearly erroneous, because there was a motion for rehearing pointing out that the courts decision violated the ex post facto prohibition in the Constitution:

1. It is established Missouri Law that when the Supreme Court committs error, they are the only ones with the record, and have jurisdiction to correct their error by recalling their mandate or granting a rehearing. SEE; SMITH V. WYRICK. 538 F.Supp. 1017 (WDMO. 1982), affirmed, ____F.2d _____ (CA8 December, 1982), cert. pending, ____ US _____ (December, 1982).

2. Missouri has changed the procedures so much with respect to the Instructions on Murder that the petitionerhas been denied due process of law:

A. Ex post facto law violation has been committed in this case. SEE: WEAVER V. GRAHAM. 101 S.Ct. (1981), wherein the United States Supreme Court held that due process of law is violated by applying a new rule of procedure to cases tried under the law.

B. In Boddie v. State of Conn., US , ____ S.Ct. _____ this court held that due process is violated when a new rule is attempted to be applied to situations under the old law, the Boddie court totally rejected even a court of law making a new rule and applying the same to old cases.

C. Since the Missouri Supreme Court had full chance to meet the due process argument on the motion for rehearing, state remedieshas been exhausted. SEE: State v. Zweifel, 615 SW2d 470 (Mo. App. 1981); SMITH V. WYRICK. supra.

D. In State Ex Rel. PEACH V. BLOOM. 576 SW2d (Mo. Banc), Missouri Court hold cearly that all cases must be tried under the procedural laws at the time of the offense.

WALTER JUNIOR BLAIR,
Pro se.

Walter Jr. Blair

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 31 day of January, 1983, to: Mr. JOHN ASHCROFT Attorney General at P.O. Box 899 Jefferson City Mo. 65102 Mr. GERALD M. HANDLEY #24294

Attorney for Defendant-Appellant
1125 Grand - Suite 1804
Kansas City, Missouri 64106

WALTER JUNIOR BLAIR,
Pro se.
Box 900
Jefferson City Missouri
65102